Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investments Ltd and another appeal

A

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCVC)-731 OF 2011 AND W-02(NCVC)-764 OF 2011
ZAINUN ALI, RAMLY ALI AND ZAHARAH IBRAHIM JJCA
27 JUNE 2011

C

Civil Procedure — Pleading — Statement of claim — Cause of action for accounts — Obligation to pay consultancy fees — Failure to plead — Appellant liable to pay certain sum of monies to respondent — Appellant an accounting party to respondent — Whether fatal — Whether respondent abused process of court by filling present action against appellant which had the sole effect of discovery of documents

D

Civil Procedure — Remedy of account — Action founded on contract — Fiduciary relationship — Alleged fiduciary relationship between appellant and respondent — Whether dependent on terms of contract — Whether justification for fiduciary duty to account exists — Whether fiduciary relationship can be superimposed upon contract

E

F

Civil Procedure — Remedy of account — Application allowed by trial judge — Appeal against — Obligation to pay consultancy fees — Consultancy agreements — Whether appellant and respondent's contractual relationship established — Fiduciary relationship — Whether existed between appellant and respondent — Whether fiduciary duty to account arose — Remedy of account personal against accounting party — Whether respondent abused process of court by filling present action against appellant which had sole effect of discovery of documents — Rules of the High Court 1980 O 43

G

H

Companies and Corporations — Lifting of corporate veil — Remedy of account — Relationship between appellant and respondent — Whether appellant an associated company — Whether established — Whether appellant party to consultancy agreements — Failure to plead — Whether must be specifically pleaded by litigant — Justification to lift corporate veil — Whether established

I

The appeal was against the decision of the learned High Court judge which had allowed the respondent's application for statements of account to be provided by the appellant to the respondent. The respondent's claim against the appellant was for an account from the appellant based on consultancy

A agreements entered into between the respondent and one Alcatel Standard SA and other associated companies within the Alcatel Group. The respondent claimed that by virtue of a collateral agreement between the respondent and the appellant, a duty to account arose. In their defence, the appellant stated that: (a) the appellant was not an accounting party to the respondent but to Alcatel B SA; (b) the appellant was not the beneficiary of the contract as no consideration flowed to the appellant and there was no intention to create legal relations between the respondent and the appellant; and (c) the respondent's claim had disclosed no reasonable cause of action against the appellant. The trial judge in allowing the respondent's application had found that the appellant was an C accounting party under common law on the ground that the appellant was described as an 'associated company' in the consultancy agreements and the benefits of the contract were for the appellant and so the court may pierce the corporate veil such that it was not open for the appellant to say they are not a party to the consultancy agreements. Further, the trial judge also found that D consideration had passed to the appellant and a fiduciary relationship existed between the appellant and the respondent. Consequently, the fiduciary duty to account arose. The appellant's grounds of appeal before this court, essentially, inter alia, were as follows: (i) no plea or justification to lift the corporate veil; (ii) no plea or justification for fiduciary duty to account; (iii) no contractual E relationship established between the appellant and the respondent; and (iv) no disclosure of value of deliveries to end customer under the consultancy agreements.

Held, allowing the appeal with costs:

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(1) There was no justification for lifting of the corporate veil. The appellant was neither a party to the consultancy agreements nor an 'associated company' after the consultancy agreements were signed in 2000 and 2001. Alcatel Standard SA was the contracting party in the consultancy agreements. It was against this entity that the respondent ought to pursue G its claim. There was accordingly no justification for the corporate veil to be lifted and to hold that the appellant was liable for the obligations imposed on Alcatel Standard SA under the consultancy agreements (see para 12).

H (2) The learned judge had gone beyond the pleaded case when he made a finding that the appellant was an accounting party because of an alleged fiduciary relationship between the appellant and the respondent when this was neither pleaded nor proven. The respondent's pleaded case against the appellant was based on contract ie the alleged collateral I agreement (separate from the consultancy agreements) by practice and conduct between the appellant and the respondent from 2000 until 2009. In an action based on contract (as in the present case), it is the contractual foundation that is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary

relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction (see paras 19–24).

(3) The remedy of account is personal against the accounting party and does not create any trust or equitable interest in the property. For there to exist a complete cause of action for taking of accounts, the respondent has to plead and prove that: (a) the appellant must be liable to pay a certain sum of monies to the respondent; and (b) the appellant is an accounting party to the respondent. The taking of accounts should never be used as a tool for discovery as it is not 'a mere direction to inquire and report.' In the present case, the respondent's statement of claim did not plead the above requirements for a cause of action for accounts. As the respondent had only pleaded a purely contractual claim, the only remedies available to it were either damages or specific damages; both of which were not established based on the evidence at trial (see paras 27–33).

(4) The obligation to pay the respondent the consultancy fees under the said consultancy agreements lay with Alcatel Standard SA, Alcatel CIT and Alcatel Italia and not the appellant. The respondent had failed to establish any contractual relationship between the respondent and the appellant particularly in relation to the accounts to be provided by the appellant as requested by the respondent. 'When there is no contractual relationship between the parties, there can be no cause of action founded on contract' (per James Foong JCA in *Indah Water* (*Consortium Sdn Bhd v Yong Kon Fatt* [2007] 5 MLJ 250 at p 258) (see paras 40–43).

(5) It is trite that a request for discovery is not itself a cause of action. An order for discovery is a remedy that is only available against someone whom the respondent (as the plaintiff) has a valid cause of action. Therefore, it appeared that the respondent had abused the process of the court by filling the present action against the appellant which had the sole effect of discovery of documents. Any documents and information the respondent believes it was entitled to under the terms of the consultancy agreements ought to have been sought by way of discovery at the pending arbitration proceedings in Geneva against Alcatel Standard SA (see para 48).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap keputusan Yang Arif Hakim Mahkamah Tinggi yang telah membenarkan permohonan responden untuk penyata akaun dikemukakan oleh perayu kepada responden. Tuntutan responden terhadap perayu adalah untuk akaun daripada perayu berdasarkan perjanjian perundingan yang dimeterai antara responden dan Alcatel Standanrd SA dan

A lain-lain syarikat bersekutu dalam Alcatel Group. Responden mendakwa bahawa menurut perjanjian kolateral di antara responden dan perayu, kewajipan ke atas akaun wijud. Dalam pembelaan mereka, perayu menyatakan bahawa: (a) perayu bukan pihak bertanggungjawab kepada responden tetapi Alcatel SA; (b) perayu bukan benefisiari kontrak kerana balasan tidak B disampaikan kepada perayu dan tiada niat untuk mewujudkan hubungan undang-undang antara responden dan perayu; dan (c) tuntutan responden tidak menyatakan sebab yang munasabah untuk mengambil tindakan terhadap perayu. Hakim bicara dalam membenarkan permohonan responden telah memutuskan bahawa perayu adalah pihak bertanggungjawab di bawah C *common law* atas alasan bahawa perayu telah disifatkan sebagai '*associated company*' dalam perjanjian perundingan dan faedah-faedah kontrak adalah untuk perayu dan dengan itu, mahkamah boleh menyingkap tabir perbadanan bahawa ia tidak terbuka untuk perayu mengatakan bahawa mereka bukan pihak kepada perjanjian perundingan. Selanjutnya, hakim bicara juga D mendapati bahawa balasan telah disampaikan kepada perayu dan hubungan fidusiari wujud antara perayu dan responden. Akibatnya, kewajipan fidusiari ke atas akaun wujud. Alasan perayu dalam rayuan di hadapan mahkamah ini, pada dasarnya, antara lain, adalah seperti berikut: (i) tiada rayuan atau justifikasi untuk menyingkap tabir perbadanan; (ii) tiada rayuan atau justifikasi E bagi kewajipan fidusiari ke atas akaun; (iii) tiada hubungan kontrak yang ditubuhkan antara perayu dan responden; dan (iv) tiada pendedahan nilai penghantaran kepada pelanggaran akhir di bawah perjanjian perundingan.

Diputuskan, membenarkan rayuan dengan kos:

F

(1) Tiada justifikasi untuk menyingkap tabir perbadanan. Perayu bukan pihak kepada perjanjian perundingan mahupun 'associated company' selepas perjanjian perundingan ditandatangani pada tahun 2000 dan 2001. Alcatel Standard SA adalah pihak kepada kontrak dalam perjanjian G perundingan. Ia adalah bertentangan dengan entiti ini bahawa responden sepatutnya meneruskan tuntutannya. Tidak terdapat justifikasi sewajarnya untuk menyingkap tabir perbadanan dalam memutuskan bahawa perayu adalah bertanggungjawab ke atas kewajipan yang dikenakan ke atas Alcatel Standard SA di bawah perjanjian perundingan (lihat perenggan 12).

H

(2) Yang Arif Hakim telah melangkaui kes yang diplidkan apabila beliau memutuskan bahawa perayu adalah pihak bertanggungjawab kerana hubungan yang dikatakan fidusiari antara perayu dan responden sedangkan ini tidak diplidkan mahupun dibuktikan. Kes responden yang I diplidkan terhadap perayu berdasarkan kontrak iaitu perjanjian kolateral yang didakwa (berasingan daripada perjanjian perundingan) dengan amalan dan perlakuan antara perayu dan responden dari 2000 hingga 2009. Dalam suatu tindakan berdasarkan kontrak (seperti dalam kes ini), ia merupakan asas kontrak yang kesemuanya penting kerana kontrak

mengawal hak-hak asas dan liabiliti pihak-pihak. Hubungan fidusiari, jika wujud sama sekali, mesti bersesuaian dengan terma-terma kontrak supaya ia selaras dan dipatuhi. Hubungan fidusiari tidak boleh menindih atas kontrak dalam apa-apa cara untuk mengubah operasi asal kontrak tersebut bertujuan untuk mengikut pembentukan sebenarnya (lihat perenggan 19–24).

(3) Remedi tanggungan adalah peribadi terhadap pihak yang bertanggungjawab dan tidak membentuk sebarang amanah atau kepentingan dalam harta yang saksama. Untuk wujudnya kausa tindakan yang lengkap untuk pengambilan akaun, responden haruslah memplidkan dan membuktikan bahawa: (a) perayu mestilah bertanggungjawab untuk membayar sejumlah wang tertentu kepada responden; dan (b) perayu adalah pihak yang bertanggungjawab kepada responden. Pengambilan akaun tidak sepatutnya digunakan sebagai alat untuk penzahiran ini kerana ia bukan '*a mere direction to inquire and report*'. Dalam kes ini, penyata tuntutan responden tidak memplidkan keperluan di atas bagi suatu kausa tindakan untuk akaun-akaun. Oleh kerana responden hanya memplidkan tuntutan yang semata-mata kontrak, remedi yang hanya terdapat hanya sama ada ganti rugi atau ganti rugi khusus, yang mana kedua-duanya tidak ditubuhkan berdasarkan keterangan semasa perbicaraan (lihat perenggan 27–33).

(4) Kewajipan untuk membayar yuran perundingan responden di bawah perjanjian perundingan terletak pada Alcatel Standard SA, Alcatel CIT dan Alcatel Italia dan bukan pada perayu. Responden telah gagal untuk menubuhkan apa-apa hubungan kontrak antara responden dan perayu terutamanya berhubung dengan akaun yang diberikan oleh perayu seperti yang diminta oleh responden. 'When there is no contractual relationship between the parties, there can be no cause of action founded on contract' (James Foong HMR dalam *Indah Water* (*Consortium Sdn Bhd v Yong Kon Fatt* [2007] 5 MLJ 250 di ms 258) (lihat perenggan 40–43).

(5) Ia adalah ketetapan bahawa suatu permintaan untuk penzahiran bukanlah dengan sendirinya suatu kausa tindakan. Suatu perintah bagi penzahiran merupakan remedi yang hanya wujud terhadap seseorang yang mana responden (sebagai plaintif) mempunyai kausa tindakan yang sah. Oleh itu, ternyata bahawa responden telah menyalahgunakan proses mahkamah dengan memfailkan tindakan ini terhadap perayu yang mempunyai kesan tunggal penzahiran dokumen. Apa-apa dokumen dan maklumat responden percaya ia berhak di bawah terma perjanjian perundingan sepatutnya telah diminta melalui cara penzahiran semasa prosiding timbang tara yang belum selesai di Geneva terhadap Alcatel Standard SA (lihat perenggan 48).]

Notes

For cases on pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5775–6504.

For cases on lifting of corporate veil, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 448–451.

Cases referred to

Baboo Janokey Doss v Damoder Das [1843] Moore Ind App 175, PC (refd)

Bristol and West Building Society v Mothew [1996] 4 All ER 698, CA (refd)

Cyril Sharpe, Re [1992] FCA 616, FC (refd)

Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 (refd)

Indah Water Consortium Sdn Bhd v Yong Kon Fatt [2007] 5 MLJ 250, CA (refd)

John Alexander Clubs Pty Ltd v White City Tennis Club (Matter No S309/2009) [2010] HCA 19, HC (refd)

Law Kam Loy v Boltex Sdn Bhd [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)

Master Strike Sdn Bhd v Sterling Height Sdn Bhd [2005] 3 MLJ 583; [2005] 2 CLJ 596, CA (refd)

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu & Another Appeal [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (refd)

Selangor United Rubber Estates Ltd v Cradock and Others [1965] 1 Ch 896, CA (refd)

South East Asia Insurance Bhd v Nasir Ibrahim [1992] 2 MLJ 355; [1992] 1 CLJ (Rep) 295, SC (refd)

Tenaga Nasional Bhd v Irham Niaga Sdn Bhd [2011] 1 MLJ 752; [2011] 1 CLJ 491, CA (refd)

Vellasamy Ponnusamy v Gurbachan Singh [2006] 2 MLJ 715; [2006] 1 CLJ 805, HC (refd)

Legislation referred to

Contracts Act 1950 s 26

Rules of the High Court 1980 O 43

Appeal from: Civil Appeal No S-22NCVC-10 of 2010 (High Court, Kuala Lumpur)

Elaine Yap (Mohd Ariff Emran with him) (Wong & Partners) for the appellant.
Renu Zechariah (Rosley Zechariah) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant herein was the defendant at the court below and the

respondent was the plaintiff there. The appeal before us is against the decision of the learned High Court judge dated 4 March 2011 allowing the respondent's application for statements of account to be provided by the appellant to the respondent.

[2] The respondent's claim against the appellant is for an account from the appellant based on consultancy agreements entered into between the respondent and one Alcatel Standard SA and other associated companies within the Alcatel Group. The respondent claimed that by virtue of a collateral agreement between the respondent and the appellant, a duty to account arose.

[3] The appellant's defence in brief is:

(a) the appellant was not an accounting party to the respondent but to Alcatel SA;

(b) the appellant was not the beneficiary of the contract and no consideration flowed to the appellant and there was no intention to create legal relations between the respondent and the appellant; and

(c) the respondent's claim had disclosed no reasonable cause of action against the appellant.

FACTUAL BACKGROUND

[4] The appellant had secured certain projects from Celcom Bhd and Telekom (M) Bhd with regards to a telecommunication network system in Malaysia, wherein the work for the projects would be undertaken and implemented by the appellant with the consultancy services, being provided by the respondent to the appellant.

[5] The respondent entered into defining agreements with the appellant's main company ie Alcatel-Lucent Trade International AG (also known as Alcatel Standard SA) and other associated companies within the Alcatel Group. The said agreements provide for the mode and manner of payments to be made to the respondent.

[6] The respondent claimed that, over the years since 2000, the appellant rendered some form of accounts to the respondent and the respondent's fees was computed and paid by the appellant in the region of USD7m. To the respondent, this was a collateral agreement by practice and conduct between the appellant and the respondent from 2000 until the appellant terminated the respondent's services in 2009 and stopped rendering the accounts as to the

deliverables provided, as a result of which the respondent was unable to compute the amount due to them and as a consequence could not get paid for the consultancy services rendered.

[7] The respondent's claim in the court below is therefore only for accounts pursuant to O 43 of the Rules of the High Court 1980.

[8] The learned High Court judge in allowing the respondent's application found that such a collateral agreement between the appellant and the respondent have been established and proved by practice and conduct of the parties and documentary evidence. In short, learned judge had found that the appellant is an accounting party under common law on the ground that the appellant is described as an 'associated company' in the consultancy agreements and the benefits of the contract were for the appellant and so the court may pierce the corporate veil such that it is not open for the appellant to say they are not a party to the consultancy agreements. The learned judge also found that consideration had passed to the appellant and a fiduciary relationship existed between the appellant and the respondent and the fiduciary duty to account arose consequently.

[9] The appellant's grounds of appeal before this court, essentially, inter alia, are as follows:

(a) no plea or justification to lift the corporate veil;

(b) no plea or justification for fiduciary duty to account;

(c) no contractual relationship established between the appellant and the respondent; and

(d) no disclosure of value of deliveries to end customer under the consultancy agreements.

LIFTING OF THE CORPORATE VEIL

[10] The respondent's pleaded case was the existence of a collateral agreement, separate from the consultancy agreements under which it was suing. Learned judge went beyond the pleaded case when he decided to lift the corporate veil to find that the appellant was bound by the consultancy agreements (which the appellant was not a party).

[11] It is trite that parties are bound by their pleadings. For the court to lift the corporate veil, the said issue must be specifically pleaded by a litigant (see

Vellasamy Ponnusamy v Gurbachan Singh [2006] 2 MLJ 715; [2006] 1 CLJ 805). Therefore, the judgment of the learned judge ought to be set aside on this ground alone.

[12] In the present case, there was no justification for lifting of the corporate veil. The appellant was not a party to the consultancy agreements. The appellant was not even an 'associated company' after the consultancy agreements were signed in 2000 and 2001. It was open for the respondent to take Alcatel Standard SA to arbitration (as provided under the consultancy agreements) to enforce its rights, as it did in fact do. Alcatel Standard SA was the contracting party in the consultancy agreements. It is against this entity that the respondent ought to pursue its claim. There was accordingly no justification for the corporate veil to be lifted and to hold that the appellant was liable for the obligations imposed on Alcatel Standard SA under the consultancy agreements.

[13] It is settled law that the corporate veil of a company should not be lifted lightly as the concept of separate legal entity is a cornerstone of company law in Malaysia (see *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109).

[14] The learned judge in his ground of judgment (at p 38 of the records of appeal) indicated that the court was prepared to pierce the corporate veil 'in the interest of justice to prevent associated companies of Alcatel Group including the defendant (the appellant) from darting in and out with the corporate labyrinth before this court'.

[15] In this respect, Professor Gower in his *Principles of Modern Company Law*, (7th Ed), under the heading 'Interests of Justice' says the followings:

> Although the interests of justice may provide the policy impetus for creating exceptions to the doctrines of separate legal personality and limited liability, as an exception in itself it suffers from the defect of being inherently vague and providing to neither courts nor those engaged in business any clear guidance as to when the normal company law rules should be displaced. Consequently, it is difficult to find cases in which 'the interests of justice' have represented more than simply a way of referring to the grounds identified above in which the veil of incorporation has been pierced.

[16] The Court of Appeal in *Law Kam Loy v Boltex Sdn Bhd* [2005] MLJU 225; [2005] 3 CLJ 355 adopted the above principle. At p 362, of the report Gopal Sri Ram JCA stated:

A In my judgment, in the light of the more recent authorities such as *Adams v Cape Industries Plc*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity

B (see also *Adams v Cape Industries Plc* [1990] Ch 433).

[17] In another Court of Appeal case, *Tenaga Nasional Bhd v Irham Niaga Sdn Bhd* [2011] 1 MLJ 752; [2011] 1 CLJ 491, Abdul Malik Ishak JCA stated:

C You cannot simply raise the, veil of incorporation just because you feel that it is in the interest of justice. But if there is fraud, then the veil of incorporation may be lifted. But here, there was no fraud at all.

D …

Even assuming for a moment that TNBT is not in a position to pay for the award, does that mean that the appellant (TNB) being the holding company has to be liable. We just cannot ignore the rule laid down by the *Salomon*'s case. We just cannot throw out Salomon's case out of the window and pretend that it is not there. We are not prepared to depart from the rule in *Salomon*'s case. We are aware of the

E speech of Lord Denning MR in *Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners, Same v McGregor (Inspector of Taxes)* [1969] 1 WLR 1241, at p 1254, (CA); [1969] 3 All ER 855, at p 860, (CA), where His Lordship said:

F The doctrine laid down in *Salomon v Salomon & Co* [1897] AC 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind.

We categorically say that those who have chosen the benefits of incorporation must

G bear the rigours of the rule in *Salomon*'s case. And those who deal with a company should likewise be well aware of the rule in *Salomon*'s case.

[18] Based on the above authorities, we are of the view that this is not an appropriate case for learned judge to lift the corporate veil and to hold the

H appellant liable for the obligations imposed on Alcatel Standard SA under the consultancy agreements. There must be evidence either of actual fraud or some conduct amounting to fraud in equity in order to justify lifting the corporate veil. No such case was pleaded or made out in the present matter before us.

I FIDUCIARY DUTY TO ACCOUNT

[19] In the statement of claim the respondent had pleaded a purely contractual claim. We are of the view that learned judge had gone beyond the pleaded case when he made a finding that the appellant was an accounting

party because of an alleged fiduciary relationship between the appellant and the respondent when this was neither pleaded nor proven.

[20] We are of the view; that there was no fiduciary relationship between the appellant and the respondent established in the present case. Where a party alleges the breach of duty arising from any given relation, it must be incumbent on him to specify with precision what is the relation from which the duty arises. Pennycuick J in *Selangor United Rubber Estates Ltd v Cradock and Others* [1965] 1 Ch 896 stated:

> where a plaintiff alleges that the defendant is in breach of duty, he ought to specify at the very start the relation under which the duty arises in order that the defendant may set his course accordingly; and at any rate in very many cases it must be embarrassing to the defendant to plead to an allegation of breach of duty without having the relation under which the duty arises precisely specified.

[21] A fiduciary is someone who has undertaken to act for or a behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. The distinguishing obligation of fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary, (see *Bristol and West Building Society v Mothew* [1996] 4 All ER 698, the English Court of Appeal).

[22] In the present case, the respondent's pleaded case against the appellant (based on its statement of claim) was based on contract ie the alleged collateral agreement (separate from the consultancy agreements) by practice and conduct between the appellant and the respondent from 2000 until 2009. Even assuming the said collateral agreement existed (as alleged by the respondent), it is a strong principle of law that in the context of contractual relationship, unless specifically provided for in the terms of the contract, no fiduciary obligation is owed by one party to the other. There must be a critical feature that the fiduciary (ie the appellant in the present case) undertakes or agrees to act for or on behalf of or in the interests of another person (ie the respondent in the present case) in the exercise of a power or discretion which will affect the interests of that other person in a legal sense. From this power or discretion comes the duty to exercise it in the interest of the person to whom it is owed, (see *John Alexander Clubs Pty Ltd v White City Tennis Club (Matter No S309/2009)* [2010] HCA 19, High Court of Australia).

[23] The accepted traditional categories of fiduciary relationship usually arise in matters involving trustee beneficiary, agent-principal, solicitor-client,

employee-employer, director-company, and partners' inter se relationships. Unless expressly provided for in an agreement commercial transactions falling outside the accepted traditional categories of fiduciary relationship (as in the present case) often do not give rise to fiduciary duties, because they do not meet the criteria for characterisation as fiduciary in nature, (see *John Alexander Clubs*).

[24] In an action based on contract (as in the present case), it is the contractual foundation that is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

[25] In the present case, we find that the allegation of the existence of a contractual relationship between the appellant and the respondent and that the appellant received consideration in the form of benefit of the consultancy agreements (which was denied), do not make the appellant a fiduciary vis-d-vis the respondent. The learned judge should not have found the existence of any fiduciary duty to account between the appellant and the respondent. By doing so, the court had interpreted the terms and conditions contrary to the express terms appearing in the consultancy agreements.

[26] As stated earlier the respondent's claim against the appellant is purely a contractual claim. Learned judge had instead held that the appellant is liable to the respondent based on a claim for accounts whereas no such cause of action was pleaded by the respondent in the statement of claim.

[27] The remedy of account is personal against the accounting party and does not create any trust or equitable interest in the property. In the present case, the appellant is not an accounting party under the written contract ie the consultancy agreements. A plaintiff who seeks the remedy of an account must prove that firstly, the defendant is an accounting party and secondly, the plaintiff is entitled to some sum of monies from the defendant. The latter is important as the remedy of account is not for the purpose of discovery, (see *Civil Remedies in Malaysia* by Cheong May Fong [2007] Sweet & Maxwell Asia — at p 390).

[28] According to *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*, (4th Ed), (Sydney: Lexis Nexis Butterworth's, 2002, para 25-020 at pp 871–875), the availability of an account in equity for a plaintiff relying on

a common law right is not so clear. He suggests eight possible categories when such a decree may be granted:

(a) where there were mutual accounts ie where there were receipts and payments on both sides, not merely receipts and payments on one side;

(b) where the parties stood in a quasi-fiduciary relationship or a relationship of confidence eg principal and agent relationship;

(c) where the court ordered general administration of a dissolved partnership;

(d) where an account would be too complicated to settle at law;

(e) in the case of legal waste an account would be ordered when the plaintiff also asked for an injunction, waste having already been committed;

(f) in intellectual property cases, such as passing off and infringement of patent or trademark cases;

(g) cases where not to order an account would abort the plaintiff's right; there were cases where the plaintiff would have had a legal right to be paid money from the defendant if only the defendant had not prevented the plaintiff's rights accruing; and

(h) an order for an account will be made against persons who make profits from treasonable activities.

[29] In *Baboo Janokey Doss v Damoder Das* [1843] Moore Ind App 175, Dr Lushington of the Privy Council ruled:

> Again, it must be remembered that the decree cannot stand unless it be first clearly proved that the appellants are, if anything should be found due to the respondents arising from the acts and dealings of ramchund, liable to answer that demand; we cannot make a decree, ordering them to account, without first determining that they are liable to pay if anything be found due.
>
> A decree for an account is not, as appears to have been assumed, a mere direction to inquire and report. It proceeds, and must always proceed, upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights, only leaving it to be inquired into, how much is due to him from the party accounting.

[30] The above ruling was followed by the Federal Court of Australia in *Re Cyril Sharpe* [1992] FCA 616, where Drummond J said:

> The taking of an account is only appropriate once it has been established that the parties involved are in an accounting relationship with each other, that it, only once it has been established that one party is liable to pay to the other anything that is found on the taking of the account, to be due to that other.

(The same principle was adopted by the Supreme Court of Queensland in *TH Mulherin Family Trust v Quinn Villages* [2007] QSC 231; see also *Bullen & Leake & Jacob's Precedents of Pleadings (13th Ed), Sweet & Maxwell* [1990] at p 4).

[31] From the above authorities, for there to exist a complete cause of action for taking of accounts, the respondent has to plead and prove the following:

(a) the appellant (as the defendant) must be liable to pay a certain sum of monies to the respondent (as the plaintiff); and

(b) the appellant (as the defendant) is an accounting party to the respondent (as the plaintiff).

[32] It is to be noted that the taking of accounts should never be used as a tool for discovery as it is not 'a mere direction to inquire and report'.

[33] The respondent's statement of claim in the present case did not plead the above requirements for a cause of action for accounts. As the respondent had only pleaded a purely contractual claim, the only remedies available to it were either damages or specific damages; both of which were not established based on the evidence at trial.

NO SEPARATE CONTRACTUAL RELATIONSHIP

[34] The strength of the respondent's claim against the appellant was based on the alleged collateral agreement between the respondent and the appellant by conduct and practice of the appellant in notifying the respondent of the value of all deliveries made to the customers of the appellant ie Celcom and Telekom; and informing the respondent of the manner of computation of payment of invoices sent by the respondent. It is not in dispute that the claim was not made based on the consultancy agreements themselves.

[35] The majority of the consultancy agreements clearly provided that the consultancy fees to be paid to the respondent was not based on the amount of deliverables made by the appellant to its customers. Instead the consultancy fees payable would be based on the amount invoiced by Alcatel Italia or Alcatel CIT to the appellant. Therefore it cannot be said that the appellant had, as pleaded by the respondent, agreed to notify the appellant of the value of deliveries that had been made to the customers of the appellant so as to give effect to the terms appearing in the consultancy agreements. Such an arrangement would clearly not be in line with the express terms of the consultancy agreements that were agreed between the respondent and Alcatel Standard SA.

[36] There is no evidence that the appellant had provided the respondent with the value of deliveries that it had made to its customers throughout the validity period of all, but for the first and second consultancy agreements. In respect of the said two agreements above, it was established in evidence that accounts as required were already rendered and closed vide the appellant's letter dated 23 July 2004 to the respondent. Therefore the conduct and practice relied upon by the respondent to prove the existence of the so-called collateral agreement was not consistent with what the respondent set out to prove.

[37] Even if there existed an alleged separate collateral agreement (as pleaded by the respondent) the alleged agreement did not amount to a valid contract enforceable under the law as no consideration passed from the respondent to the appellant based on the requirement of s 26 of the Contracts Act 1950.

[38] As the statement of claim stood, no consideration for the agreement was pleaded and no consideration could be discerned from the bundle of pleadings. The purported collateral contract is therefore void for want of consideration (see *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355; [1992] 1 CLJ (Rep) 295 – Supreme Court).

[39] In all the consultancy agreements between the respondents and Alcatel Standard SA, there existed what is termed as 'the entire agreement clause' to the effect that 'This Agreement constitutes the entire agreement between the parties as to the subject matter hereof, it sets forth all intended rights and obligations and supersedes any and all previous agreements and understandings between the parties with respect to the subject matter hereof'.

[40] The subject matter of the respondent's claim against the appellant ultimately related to the payment of consultancy fees to be paid to the respondent by Alcatel Standard SA under the consultancy agreements between the respondent and Alcatel Standard SA, where the respondent prayed for an order that the appellant (who was not a party to the consultancy agreements) to notify and provide the respondent with the value of deliveries, that the appellant had made to its customers ie Celcom and Telekom, for the purpose of computing the amount of consultancy fees to be paid by Alcatel Standard SA to the respondent under the consultancy agreements. It must be noted that the obligation to pay the respondent the consultancy fees under the said consultancy agreements lay with Alcatel Standard SA, Alcatel CIT and Alcatel Italia and not the appellant.

[41] The effect of 'the entire agreement clause' in all the consultancy agreements, is that the respondent (as a party to the consultancy agreements) was bound by the terms of the consultancy agreements with regard to all the matters mentioned in the said agreements, particularly on matters relating to

A the terms of payments of the consultancy fees and manner in which such payments were to be made. Such 'entire agreement clause', in our judgment does not permit any term to be implied or to import any other considerations not in the contract, including any other collateral agreements with another party (not a party in the consultancy agreements). All matters relating to the B payment of consultancy fees to be paid by Alcatel Standard SA and the respondent (both are parties to the consultancy agreements) as well the manner of computation of the fees must be read within the four walls of the consultancy agreements themselves (see Court of Appeal's decisions in *Master Strike Sdn Bhd v Sterling Height Sdn Bhd* [2005] 3 MLJ 583; [2005] 2 CLJ 596; C and *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu & Another Appeal* [2004] 1 MLJ 8; [2003] 4 CLJ 337).

[42] It is therefore our view that, for a collateral agreement to exist in the legal sense (as alleged by the respondent) it must be implied that it was entered D into in consideration of the consultancy agreements being entered into by Alcatel Standard SA with the respondent. In such a case 'the entire agreement clause' (as found in all the consultancy agreements) would in fact be a complete answer to any claim as to the existence of any collateral agreement between the appellant and the respondent. E

[43] Based on the above considerations, it is our view that the respondent has failed to establish any contractual relationship between the respondent and the appellant particularly in relation to the accounts to be provided by the F appellant as requested by the respondent. 'When there is no contractual relationship between the parties, there can be no cause of action founded on contract' (per James Foong JCA in *Indah Water Consortium Sdn Bhd v Yong Kon Fatt* [2007] 5 MLJ 250, at p 258 — Court of Appeal).

G DISCLOSURE OF VALUE OF DELIVERIES TO CUSTOMER

[44] Payment terms on the consultancy fees to be paid to the respondent under the consultancy agreements were not based on value of deliveries to the appellant's customers. In fact the consultancy fees payable to the respondent by H Alcatel Standard SA, Alcatel CIT and Alcatel Italia under all the consultancy agreements were calculated on the amount invoiced either by Alcatel Italia or Alcatel CIT to the appellant (cl 3.1 of the agreements referred).

[45] The learned judge had found it appropriate that the appellant provide I to the respondent copies of all documents proving the value of items delivered by the appellant to its customers (Celcom and Telekom) with regard to the entire project related to the consultancy agreements (para (b) of the judge's oder dated 4 March 2011) when in fact, none of the consultancy agreements required this. The consultancy fees payable did not relate in any way to the

amount actually delivered by the appellant to Celcom and Telekom. As such the respondent did not have any valid interest to the said documents at any material time.

[46] The court is also of the view that the respondent's claim against the appellant is a misconceived action for discovery of information and documents to enable it to institute proceedings against Alcatel Standard SA, Alcatel CIT and Alcatel Italia under the consultancy agreements for consultancy fees. Such intention is evident in Messrs Rosley Zechariah's letter of demand (on behalf of the respondent) dated 1 September 2010 to the appellant. Under the consultancy agreements, the consultancy fees were due not from the appellant, but from Alcatel Standard SA, Alcatel CIT and Alcatel Italia. The appellant was not a party to any of the consultancy agreements and therefore not liable to make any payments to the respondent for the said consultancy fees. It must also be noted that the terms of payment under the consultancy agreements provided that payment of consultancy fees would only be made once a report of the work done is issued by the respondent to the party making the payment. From all the evidence produced in court by the respondent, all the reports in question were directed to Alcatel CIT, Alcatel Italia and Alcatel Standard SA. All the invoices relating to the consultancy fees were to be issued either in the name of Alcatel CIT or Alcatel Italia pursuant to the terms of the consultancy agreements.

[47] The respondent had also instituted arbitration proceedings solely against Alcatel Standard SA claiming payment of the alleged consultancy fees due from Alcatel Standard SA under ICC Case No 16291/MLK/ARP in Geneva. No claims for payment were ever issued by the respondent to the appellant under any of the consultancy agreements.

[48] It is trite, that a request for discovery is not itself a cause of action. An order for discovery is a remedy that is only available against someone whom the respondent (as the plaintiff) has a valid cause of action. Therefore, it appears that the respondent had abused the process of the court by filling the present action against the appellant which had the sole effect of discovery of documents. Any documents and information the respondent believes it was entitled to under the terms of the consultancy agreements ought to have been sought by way of discovery at the pending arbitration proceedings in Geneva against Alcatel Standard SA.

CONCLUSION

[49] Based on the above considerations we are in agreement with learned counsel for the appellant that learned High Court judge had erred, in law as well as in fact, in coming to his decision to allow the application by the

respondent for the accounts and documents to be provided by the appellant to the respondent as appeared in the order dated 4 March 2011. We therefore allow this appeal with costs of RM30,000 to the appellant; and the deposit ordered to be refunded to the appellant.

Appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed